(1978) 08 BOM CK 0047

Bombay High Court

Case No: F.A. No. 151 of 1973

Regional Director, Employees'' State Insurance Corporation		APPELLANT
	Vs	
Bombay Metal and Alloys Mfg. Co. Pvt. Limited, Bombay		RESPONDENT

Date of Decision: Aug. 24, 1978

Acts Referred:

- Employees State Insurance Act, 1948 - Section 2(22), 75

Citation: (1978) 80 BOMLR 724 : (1979) 1 LLJ 323 : (1979) MhLj 99

Hon'ble Judges: G.N. Vaidya, J

Bench: Single Bench

Judgement

1. The above first appeal was filed by the Regional Director of the Employees'' State Insurance Corporation again whom an application was filed by the respondent Bombay Metal and Alloys Manufacturing Co. Pvt. Ltd., the employer-company, under S. 75 of the Employees'' State Insurance Act, 1948, wherein it was declared by the Judge of the Employees'' Insurance Court, Bombay, by his judgment and order dated September 22, 1972, that the employees'' contribution and the employer''s special contribution were not payable on the quarterly attendance-cum-production bonus paid to the workmen, as such quarterly payment is excluded from the definition of "wages" as given in S. 2(22) of the Employees'' State Insurance Act, 1948.

2. The decision of the learned Judge of the Employees'' Insurance Court is challenged in the above first appeal by the Regional Director. Mr. Jaykar, the learned counsel appearing for the appellant-Regional Director, submitted that the learned Judge committed a substantial error of law in not analysing and interpreting S. 2(22) of the Employees'' State Insurance Act, 1948 properly and in not applying his mind to the contents of the settlement under which the employer had given attendance-cum-production bonus to the workers employed on daily wages in its

workshop in the black-smith and welding departments.

3. The written settlement between the workers and the employers was embodied in the writings given by the Managing Director of the employer-company, the relevant extracts of which are produced at Exts. 2 and 3, Ext. 2 being of May 22, 1947 and Ext. 3 being of March 6, 1962. There is no dispute that Ext. 2 and Ext. 3 were in force in workshop in the blacksmith and welding departments between 1963 and 1965 with respect to which years the Regional Director was demanding the employees'' contribution and the employer''s contribution regarding the attendance-cum-production bonus.

4. The material portion of Ext. 2 runs as follows :

"NOTICE TO WORKSHOP, BLACK-SMITH DEPARTMENT AND WELDING DEPARTMENT WAGE EARNERS.

Re :- Bonus payable by way of Regular Attendance Bonus.

In order to encourage regular attendance and to bring workshop, blacksmith and welding departments into line with the other departments, it has been decided to introduced an attendance-bonus payable to daily wage earners in the workshop, blacksmith and welding departments permanent lists.

Bonus payable will be 10% of the basic wage.

All workers employed on daily wages on the workshop, blacksmith and welding departments permanent lists who attend at least 98% of the regular working time if employed on day shift, and 96% of the regular working time on night shift will be entitled to payment of the attendance bonus. This bonus will be accumulated for quarterly periods, but for the first period will be for I month from 1st June until 30th June, and thereafter for quarterly periods.

In the pro-rata calculation of the amounts due to individual workers, paid leave will count and in the attendance calculation, paid leave and permitted absence will count as attendance for purpose of ascertaining the percentage attendance of individual daily wages earners, but unexcused absence unless explained to the satisfaction of the Management will be deducted from the attendance percentage figures.

In cases of dispute, the Works Management will discuss these with representative of the workers, and if an agreement of points under dispute cannot be reached, then these will be referred to the Board of Directors who together with the Auditors of the company, will decide the same and whose decision will be final and binding".

5. The material portion of Ext. 3 is as follows :

"Production-Bonus payable to :

SMELTING DEPARTMENT WAGE EARNERS by way of Regular Attendance-Bonus.

All workers employed on daily wages on the permanent list who attend at least 98% of the regular working-time of the Factory if employed on day-shift and 96% if employed on night shift will be entitled to payment of the production-bonus. This bonus will be accumulated for quarterly periods, the first period being from 1st April upto including 30th June and all non-ferrous alloys including castings dispatched from the works during that time subject to adjustments of quantities rejected will be credited to a special bonus account at the rate of Rs. 3 per ton and the total, standing to the credit of this account at the end of every quarter (the first time on 30th June) will be distributed on pro-rata system based on the basic wages earned by the entitled persons, i.e., to those daily wage-earners on the permanent list who have attended regularly for at least 98% of the required attendance hours during day-shift and 96% during night-shifts.

Persons on the temporary list of persons employed on a monthly salary will not be inclined to this production-bonus neither will those daily wage earners on the permanent list who have not attended the required 98% of the working-hours of day-shifts and 96% of night shifts.

In the pro-rata calculation of the amounts due to individual workers paid leave will count and in the attendance calculation paid leave and permitted absence will count as attendance for purposes of ascertaining the percentage attendance of individual daily wage-earners, but unexcused absence unless explained to the satisfaction of the Management will be deducted from the attendance percentage figures.

In cases of dispute the Works Management will discuss these with representatives of the workers, and if an agreement of points under dispute cannot be reached, these will be referred to the Board of Directors who together with the Auditors of the company will decide on the same and whose decision will be final and binding".

6. It is argued by Mr. Jaykar that under the terms of the settlement, therefore, the employees are entitled to the attendance-cum-production bonus under Exts. 2 and 3 and the employer-company has no right to resile from the contract as long as the contract continues to be in force.

7. Mr. Jaykar, therefore, submitted that the bonus paid by the employer-company squarely falls within the first part of the definition of "wages" contained in S. 2(22) of the Employees'' State Insurance Act, 1948, which runs as follows :

""wages'' means all remuneration paid or payable in cash to an employees, if the terms of the contract of employment, express or implied, were fulfilled and includes any payment to an employee in respect of any period of authorised leave, lock-out, strike which is not illegal or lay-off and other additional remuneration, if any, paid at intervals not exceeding two months but does not include -

(a) any contribution paid by the employer to any pension fund or provident fund, or under this Act;

(b) any travelling allowance or the value of any travelling concession;

(c) any sum paid to the person employed defray special expenses entailed on him by the nature of his employment; or

(d) any gratuity payable on discharge;"

8. Mr. Jaykar urged that the reason given by the learned Judge of the Employees'' Insurance Court in paragraph 6 of his judgment that because the bonus is paid at intervals exceeding two months, such payment was expressly excluded from the definition of "wages" for the purpose of the Employees'' State Insurance Act, 1948, and no contribution could be demanded by the Employees'' State Insurance Corporation, was patently illegal, as the learned Judge did not consider the distinction between the first part and the second part of the definition of "wages" contained in S. 2(22) of the Employees'' State Insurance Act, 1948.

9. Mr. Jaykar referred to the decision of Vimadalal and N. B. Naik, JJ. in Mahalakshami Glass Works Private Ltd. v. Employees'' State Insurance Corporation, (1967) 49 F.J.R. 301. Where it was held :

"The definition of the word ''wages'' in S. 2(22) of the Employee''s State Insurance Act, 1948, is in two parts. The first part lays down that all remuneration paid or payable to an employee under the terms of the contract of employment is ''wages''. Incentive bonus paid voluntarily by an employer will not fall within this part of the definition because, though it amounts to remuneration it cannot be said to have become a term of contract of employment, express or implied, and was not payable under the contract of employment, as such."

10. This Court followed the decision of the Supreme Court in Braithwaite and Co. (India) Ltd. Vs. The Employees'' State Insurance Corporation, In the case before the Supreme Court, the appellant-company introduced the Inam Scheme in December, 1955. This payment of inam was not amongst the original terms of contract of employment between the employees and the company. In those terms, there was no offer of any reward or prize to be paid for any work done by the employees. The employees were expected to work for certain periods at agreed rates of wages. The only offer under the Scheme was to make incentive payments if certain specified conditions were fulfilled by the employees. The Company, however, reserved the right to withdraw the Scheme altogether without assigning any reason or to revise its conditions at its sole discretion. There were also other conditions in the Inam Scheme, which led the Supreme Court to hold that the payment of Inam, though remuneration, could not be said to have become a term of the contract of employment within the meaning of the definition of "wages" as given in S. 2(22) of the Employees'' State Insurance Act, 1948.

11. Mr. Jaykar, the learned counsel for the appellant, submitted that those two cases are distinguishable from the present case, inasmuch as in the present case, the

written settlement (Exts. 2 and 3) did not contain any clause which left it to the discretion of the employer-company to withdraw the bonus as and when it pleased. On the contrary, Ext. 2, on which alone Mr. Jaykar relies for the purposes of this case, although Mr. Shellim Samuel for the respondent says that we are concerned with Ext. 3 also, leaves no doubt that it was the right of the employees to receive the attendance-cum-production bonus; and hence the said bonus had become a term of the contract of employment, which was expressed in the settlement within the meaning of the first part of the definition "wages" contained in S. 2(22) of the Employees'' State Insurance Act, 1948.

12. The only argument by which Mr. Shallim Samuel, the learned counsel appearing for the employer-company, tried to repel the arguments of Mr. Jaykar was that despite the wording and expression used in Exts. 2 and 3, the attendance-cum-production bonus paid by the employer-company in the present case cannot be said to be a term of the contract of employment and further, even if it was a term of the contract of employment, the second part of the definition of "wages" in S. 2(22) of the Employees'' State Insurance Act, 1948, specifically excluded the payment of remuneration made at intervals exceeding two months; and therefore, the learned Judge of the Employees'' Insurance Court was right in granting the declaration in favour of the employer-company.

13. The arguments of Mr. Jaykar deserves to be accepted and the argument of Mr. Shallim Samuel must be held to be against the plain terms of S. 2(22) of the Employees'' State Insurance Act, 1948, inasmuch as the second part of the definition is only an inclusive definition which includes remuneration other than the remuneration as per the terms of the contract referred to in the first part of the definition. The second part, which is an inclusive part of the definition, cannot control the first part of the definition, where the word "wages" means all remuneration paid or payable in cash to an employee, if the terms of the contract of employment, expressly or implied, were fulfilled.

14. In cases like the present one, where there is an express contract under which the attendance-cum-production bonus is paid, the second part does not come into operation at all. The second part is attracted only to those remunerations which do not fall within the scope of the first part of the definition.

15. It is, therefore, manifest that the learned Judge of the Employees'' Insurance Court committed a substantial error of law not only in not applying his mind to the express terms of the contract at Exts. 2 and 3 but also in reading into the first part of the definition the restrictions contained in the second part of the definition which applied only where the remuneration was not covered by the first part of the definition.

16. In the result, the judgment and order passed by the learned Judge of the Employees'' Insurance Court, Bombay on September 22, 1972 are set aside and the

application filed by the respondent-employer under S. 75 of the Employees'' State Insurance Act, 1948 is dismissed with costs throughout.

17. The appeal is allowed with costs throughout.